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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-437, 73-457, 73-464

MOBIL OIL CORPORATION, PUBLIC SERVICE COMMISSION OF NEW YORK, MUNICIPAL DISTRIBUTORS GROUP, *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

BRIEF FOR PIPELINE PURCHASER GROUP

Florida Gas Transmission Company
Michigan Wisconsin Pipe Line Company
Natural Gas Pipeline Company of America
Southern Natural Gas Company
Tennessee Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Eastern Transmission Corporation
Transcontinental Gas Pipe Line Corporation
Trunkline Gas Company
United Fuel Gas Company
United Gas Pipe Line Company

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INTRODUCTION

This brief is submitted on behalf of all the major interstate pipeline purchasers which are supplied from

the Southern Louisiana area.[1] Each pipeline owns and operates extensive natural gas transmission facilities regulated by the Federal Power Commission, and purchases substantial volumes of natural gas under long-term contracts with independent producers from dedicated reserves in the Southern Louisiana Area.

The members of the Pipeline Purchaser Group actively participated in all of the proceedings below, and were review petitioners in the earlier court review (Southern Louisiana I) decided by the United States Court of Appeals for the Fifth Circuit on March 19, 1970.[2] As recognized by the Court of Appeals in that opinion, the pipelines appear solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment resulted from the fact they have been "concerned that the price level will not elicit sufficient supply for their needs."

In the subsequent administrative[3] and court[4] proceedings (Southern Louisiana II), the Pipeline Purchaser Group participated in formulating the consensus settlement proposal, and urged its adoption by the

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[1] The Pipeline Purchaser Group consists of Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

[2] *Southern Louisiana Area Rate Cases (Austral Oil Co.* v. *FPC)*, 428 F. 2d 407 (5th Cir.), cert. denied, 400 U.S. 950 (1970).

[3] *In the Matter of Southern Louisiana Area Rates*, Docket No. AR 69-1, 46 F.P.C. 86 (1971).

[4] *Southern Louisiana II (Placid Oil Company* v. *FPC)*, 483 F. 2d 880 (5th Cir.).

Commission and affirmance by the Court of Appeals. Accordingly, the Pipeline Purchaser Group is aligned with the Federal Power Commission, Respondent in this Court.

STATEMENT

The Federal Power Commission orders involved in these causes fixed just and reasonable rates for sales of gas produced in the Southern Louisiana and offshore area, and also the appropriate transportation rates to be charged the producers by pipelines for transporting liquids and liquefiable hydrocarbons in the Southern Louisiana area.

The area rates were initially determined in 1968, when the Commission issued its Opinion No. 546 following hearings initiated in 1962. That opinion left open the level of charges to be applied to the transportation services, 40 F.P.C. 530, 611. The Commission reopened those proceedings on December 24, 1970, following judicial affirmance (I A. 352) and consolidated the first Southern Louisiana proceeding with the second Southern Louisiana proceeding (I A 360). Thus, the orders before this Court conclude producer and related rate proceedings which have been in litigation continuously over the past twelve years.

In the most recent series of evidentiary hearings, resulting in Opinion No. 598 here under review, the Pipeline Purchaser Group sponsored the witnesses which presented evidence concerning fundamental issues in the proceeding, namely (a) market requirements for Southern Louisiana gas; (b) gas reserves and deliverability from Southern Louisiana and offshore sources; and (c) costs for transportation by

pipeline of liquids and liquefiables for the account of producers.

This evidence concerning the markets dependent upon gas from Southern Louisiana, the extent to which such market needs should be met, and the quantity of present and future reserves required to accomplish this—forms the backbone for the Commission determination that the overall rate package will likely elicit a "reasonable target level" of between 45 and 50 trillion cubic feet of newly discovered reserves from this area over a five year period (II A. 623).

The contested issue concerning the cost incurred by pipelines for transportation of liquids and liquefiables for the account of the producers (in conjunction with purchases of gas from them), was resolved by the Commission in the portion of Opinion No. 598 which prescribed charges for these services (II A. 650-51).

These items, although embodied in a consensus settlement proposal, were the subject of full hearings, followed by findings and conclusions based on the record in this proceeding.

Accordingly, these facets of the Commission order, fully affirmed by the Court of Appeals for the Fifth Circuit, are *not* subject to the criticism which the District of Columbia Circuit voiced in its 1973 opinions in (1) the *Texas Gulf Coast Area Natural Gas Rate Cases,* 487 F.2d 1043, with reference to basic area rates, contingent escalations and refunds, and in (2) *Mobil Oil Corp.* v. *FPC,* 483 F.2d 1283, the rulemaking proceeding involving applicable charges for pipeline transportation of liquefiables. In each of those cases, unlike the Southern Louisiana proceeding, the rate orders relied on factors which had not been presented in the evidentiary record.

Accordingly, the consensus settlement which formed the fabric of the rate structure for Southern Louisiana was considered by the Commission, and reviewed by the Court of Appeals for the Fifth Circuit, against a backdrop of a full evidentiary record. We undertake to demonstrate that substantial evidence supports the Commission order, and the affirmance given by the Court of Appeals was merited.

ARGUMENT

In *Southern Louisiana I,* the Fifth Circuit criticized the Commission's earlier area rate order for failure to relate the pricing mechanism to the supply sought to be elicited, and assigned the Commission the task of establishing rates which would meet the desired level of service.[5] When this Court denied certiorari, sought by these same Petitioners,[6] the Commission became obligated to fulfill that assignment.

The supply-eliciting mechanisms adopted by the Commission in the reopened Southern Louisiana proceeding, were three-fold. In addition to (1) the customary area rate level for new gas supplies, the order permitted (2) refund workoff in return for specified quantities of new dedications of gas; and (3) price escalations in specified amounts to become effective when designated quantities of new gas are dedicated to interstate markets, over and above the volumes used for refund workoff.

The first feature, the regular area rate level is important, of course. But, as history has shown, it does

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[5] *Ibid.* at 444.

[6] *Municipal Distributors Group* v. *FPC,* 400 U.S. 950 (1970).

not automatically assure that new supplies will flow to the interstate market. The other two provisions, refund workoff and contingent escalation, are especially designed to attract particular dedications of new gas. And, it is of particular concern to the pipeline purchasers, that the basic attack of the three Petitioners is directed against those features of the order which are most likely to be effective, if preserved.

Also harmful, in our view, is the other major basis upon which the three Petitioners seek to undermine the order, namely that it results from a settlement proposal, rather than originating in the bosom of the Commission. In light of the experience heretofore gained by all who have been a part of the producer price regulation scenario, it is almost disingenuous to suggest that a better and more efficacious product of this type can be spawned from agency deliberation, rather than cooperative efforts of all parties, overseen by the Commission staff.

The Pipeline Purchaser Group seeks to demonstrate in this section that (I) the consensus settlement proposal fashioned by the parties upon their understanding of the law of the case, was an appropriate vehicle for resolving the issues upon Commission consideration and approval of its terms; (II) the basic issues relative to eliciting additional gas supplies under appropriate supervision, have been properly determined and substantial evidence supports the result; and (III) the additional issue relating to the appropriate charge for transportation of producer liquids and liquefiables by pipeline purchasers, was also properly determined in this particular instance.

I.

THE COMMISSION RATE ORDER WAS PROPERLY FORMULATED ON THE BASIS OF THE CONSENSUS SETTLEMENT PROPOSAL

Before turning to the specific issues which the Commission dealt with in light of the guidelines laid down by the Court of Appeals in *Southern Louisiana I*, and with full awareness of the economic and supply conditions in this area, we discuss preliminarily the format employed by the Commission—approval of the consensus settlement proposal. Petitioners devote major portions of their argument to attacks upon this feature of the procedural history of the case. They place major reliance on the District of Columbia Circuit's opinion remanding another area rate order, *Texas Gulf Coast Area Natural Gas Rate Cases*, 487 F.2d 1043 (1973). In so doing, they ignore two marked differences between that case and this are (1) the consensus settlement developed by the parties here; and (2) the full evidentiary record which followed formulation of the proposal, in this, but not the other case.

Petitioner's attacks upon the settlement proposal area neither accurate nor appropriate. They resort to disparagement of the divergent groups and governmental entities, which formulated for Commission consideration, the framework of a rational area rate structure.[7]

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[7] The Municipal Distributors Group has seen fit to attack both the distributors and the pipelines as being uninterested in the amount they must pay for their gas supplies, leading them to "accept absurdities" (Brief, p. 53), and the New York Commission, although more temperate, digresses to hypothesize why it believes other parties are insensitive to consumer interest objectives (Brief, p. 47)—though it does not explain why it alone among the state regulatory agencies seeks to upset the Southern Louisiana rate structure. Mobil's comparable approach is to characterize the proponents of the Commission and court-approved rate order as "anti-competitive" (Brief, p. 27).

None of the foregoing detracts from the end result of the discussions, in which all of them participated; the sessions were, of course, open to all parties, and were chaired by the Commission's staff. The proposal contains many protective features insisted upon by the pipelines, distributors and the Commission staff. The fact that a few, a remarkably few, of the parties oppose portions of the resultant rate order does not condemn, or even cast a shadow upon the quality of the product.

In the first place, this was not the type of compromise settlement utilized in disposing of run-of-the-mill litigation, frequently based upon "splitting the difference." Instead, it is a comprehensive plan in which the Commission staff and all public and private segments participated after the discussions had been convened by order of the Presiding Examiner (I A. 92-3).

Ultimately, the consensus settlement proposal was presented for approval by the Commission, after having been extensively supported by evidence in the hearings. As we show in the next section, substantial evidence underlies each of the basic determinations in Opinion No. 598, and this is all that is required of a Commission order.

The most important feature of the procedure employed here, however, is the fact that the proposal was developed in accordance with the guidelines laid down by the Court of Appeals in *Southern Louisiana I.* In other words, the basic purpose of the proposal was not

simply to arrive at a result in this lengthy case, but more importantly to translate the court-prescribed standards into an appropriate schedule of rates. Thus the parties to the settlement discussions were keenly aware of the obligations the court had imposed upon the Commission in this case, and their objective at all times was to develop a proposal which would comply with the court-prescribed standards.

Moreover, in addition to the substantive response to the teachings of *Southern Louisiana I,* the procedure itself was stated, and we believe recommended, in the Fifth Circuit's earlier opinion:[8]

> "Widespread use of the settlement technique would result in negotiations pitting market forces against each other on an aggregate scale, overseen by the Commission."

Since the settlement proposal was formulated in the manner outlined by the court the adoption of this technique in resolving the remaining issues in the proceeding strengthens rather than weakens the resulting order. And contrary to the suggestions in petitioners' briefs that this represents a novel (and hence allegedly defective) procedure, there is ample precedent for the use of settlement proposals in administrative proceedings.

Section 5(b) of the Administrative Procedure Act, 5 U.S.C. § 554(c), specifically provides that an agency

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[8] *Ibid.* at 434.

give all interested parties opportunity to make settlement proposals. The Senate Judiciary Committee characterized this settlement provision as being of the "greatest import."[9]

The Commission's Rules of Practice and Procedure also specifically provide for settlement conferences and proposals,[10] and the courts have insisted that the Commission give serious consideration to settlement proposals. *Michigan Consolidated Gas Company* v. *FPC*, 283 F.2d 204, 224 (D.C. Cir.), certiorari denied, 364 U.S. 913 (1960). More recently in *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F.2d 1232 (1972), the District of Columbia Circuit again held that "[t]he Commission *cannot refuse to consider* a proposal which appears on its face at least consistent with [its] duty of protecting the ultimate consumer.'"

In *Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345, 347 (5th Cir. 1962), certiorari denied, 375 U.S. 941 (1963), the court sanctioned Commission use of the settlement approval technique in the following terms.

> "Commission approved settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of the ever more complicated problems facing an inadequate staff . . . Consequently, settlements should be encouraged, not discouraged."

It is noteworthy that in addition to the Fifth Circuit, both the Ninth Circuit and the Tenth Circuit Courts

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[9] Administrative Procedure Act—Legislative History, Sen. Doc. No. 248, 79th Cong., 2nd Sess., 203 (1945).

[10] Section 1.18(a), 18 C.F.R., Subchapter A, Part 1.

of Appeals have approved (and even suggested) the use of the settlement proposal method for resolving producer area rate proceedings. In the *Permian Basin* case, the Tenth Circuit stated: [11]

> "Rate making under the Act has produced a superabundance of delay and litigation. Much gas has moved through the pipelines since the First Phillips decision. We wonder if the time has not come for the establishment of a better rapport among the Commission, the consumers, the distributors, the pipelines, and the producers. Some practical means of resolving the economic and legal issues is highly desirable. The Commission has approved many settlements. The use of this procedure may well be explored further in an effort to obtain a true 'balancing of the investor and the consumer interests.' (320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333)."

The Commission has also been upheld in disposing of rate proceedings through approval of settlement proposals when there is less than unanimous agreement among the parties to the proceeding. The Fourth Circuit ruled that this is within the Commission's powers, *Cities of Lexington, et al.* v. *FPC,* 295 F.2d 109, 119 (1961). And, in reviewing a recent Commission decision involving another of the important area rate settlements, *In Re Hugoton-Anadarko Area Rate* Case, 466 F.2d 974 (1972), the Ninth Circuit stated (at 981):

> ". . . we do not agree with the contention of petitioners and the consumer-intervenors that the Commission was without power to accept the

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[11] *Skelly Oil Company* v. *FPC,* 375 F. 2d 6, 35 (10th Cir. 1967), reversed on other grounds *sub nom. Permian Basin Area Rate Cases,* 390 U.S. 747.

settlement proposal over their objections. The proposal was not dealt with by the Commission as an agreed settlement by all of the parties (which of course it was not), but as a proposed resolution on the merits.

"This was consistent with the powers conferred upon the Commission under section 5(b) of the Administrative Procedure Act, 5 U.S.C. § 554(c), and Commission procedures set forth in section 1.18(a) of its Rules of Practice and Procedure, 18 C.F.R. § 1.18(a)."

In its judicially encouraged practice of reviewing and considering settlement proposals, the Commission has made it as plain as can be that it is obliged to assess the proposal in a given case in light of the record. And in this particular case, the record was developed in light of the settlement proposal as well. That is, the settlement proposal had been developed and presented when much of the evidence, including that proferred by the Pipeline Purchaser Group, was submitted. All parties had the opportunity, vigorously exercised by the petitioners, to challenge and test that evidence. They can point to little in the record which substantiates their present criticisms.

Indeed, the bulk of the evidence introduced in the record following the presentation of the settlement proposal was addressed to the court-prescribed standards. We now turn to the discussion of the manner in which such standards were met in this proceeding.

II.

THE COURT-PRESCRIBED ISSUES HAVE BEEN APPROPRIATELY RESOLVED

Although in a sense the issues in this proceeding encompass all of the determinations customary in establishing area rates, quality standards and refund procedures, the handling of these matter was considerably simplified by reason of earlier instructions given by the court in *Southern Louisiana I.*

Unlike its earlier efforts, the Commission operating under such guidance, did not this time focus so intently upon utility cost accounting as to lose sight of the vital consideration of future supply. Instead, it followed the principles discussed by the Fifth Circuit in the sections of its March 19, 1970, opinion entitled, "Needed Improvements in the Commission Presentation of Cases for Review," [12] and "Findings as to Market Variables; Supply and Demand," [13] and "Assessment of Consequences Upon the Industry." [14]

There was substantial evidence in the record of this proceeding to support the Commission's determinations not only with regard to the cost of new gas and of flowing gas, but also as to the market and supply evidence called for by the court in Southern. Louisiana I.

A. "The Needs of Consumer Service—The Demand for Gas"

Recognizing special responsibility in handling the gas supply issue, the Commission noted the desirability of dealing quantitatively and qualitatively with demand

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[12] *Ibid.* at 441.

[13] *Ibid.* at 442.

[14] *Ibid.* at 441.

for Southern Louisiana gas (II A. 595), because "the supply of natural gas must be considered in light of demand."[15]

In reviewing the record to ascertain whether the consensus proposal had been properly justified, the Commission specifically relied upon by the Pipeline Purchaser Group's extensive market study entitled "Requirements for Southern Louisiana Natural Gas Through 1980", and also the comprehensive gas reserves and deliverability evidence which we presented through another witness (II A. 596).

The market evidence presented by the Pipeline Purchaser Group consisted of a comprehensive historical analysis, a study of potential markets for each of the forms of fuel available to the United States, an evaluation of new or supplementary forms of fuel and their probable impact, and an ultimate estimate of the market which is to be served with natural gas in future years, through 1980 (III A. 64-109). In addition, detailed estimates and historical data were submitted as to energy requirements, by end use (III A. 94-103), and the trends and probable impacts of changes in price of various fuels including, of course, natural gas (III A. 104-9). The Commission adopted the Group's presentation of demand for natural gas from Southern Louisiana sources (II A. 602; II A. 615).

The Commission correctly determined the requirement for the gas and then, as instructed by *Southern Louisiana I,* turned to the question of the portion of the demand for which it sought to elicit new supplies.

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[15] *Ibid.* at 443.

B. "The Level of Service at Which It Is Aiming"

The court had made clear in Southern Louisiana I that the Commission need not "set rates that will 'satisfy' demand; demand itself is a function of rates, and there might be good reason for not matching it to supply" (*ibid.* at 444). The Commission elected to follow the path suggested by the court, declining to fix a rate high enough to meet "any and all possible demands for natural gas" (II A. 616).

In fact, by adopting the Pipeline Purchaser Group's evidentiary presentation, the Commission fixed the hoped for quantity at approximately the same percentage of national demand as the Southern Louisiana region currently sustains, or roughly one-third (III A. 90).

This does not mean that all other producing areas would exactly maintain their present level of market shares in order to achieve the demands estimated for the next several years. For, as the Commission correctly observed, part of the energy requirements will be met from substitute or supplemental sources, albeit at greater cost than for natural gas under the rates prescribed here (II A. 617; III A. 90-4).

C. "The Gas Supply that the Rate Will Bring Forth"

One of the major achievements of the settlement proposal is to assist in forming a judgment as to the amount of gas which would result from the rate prescribed in the Commission's order, a target level rather than a guarantee.

As noted at an earlier point, the three principal supply-eliciting features of the settlement proposal are (1) the contingent escalation provision; (2) the provision which permits commitment of new gas re-

serves, in lieu of refunds; and (3) the ceiling price for new gas.

Foremost among the supply-eliciting features is Section 3.3.2 of the settlement proposal which grants price escalations upon commitment of New Gas Reserves over and above those used in discharge of refund obligations, at three separate supply levels, namely (a) 7.5 trillion cubic feet; (b) 11.25 trillion cubic feet; and (3) 15 trillion cubic feet.

There is no assurance as to the exact timing when the supply levels reflected by Section 3.3.2 would be achieved, but even the most skeptical of the opposition witnesses testified he assumed the escalation levels would be met each year over a three-year span (IV A. 761). Thus, the first 15 trillion cubic feet to be elicited by the "rate" were substantially assured.

Similarly, Section 8.2.2 provides strong incentive for producers to find and commit another 15 trillion cubic feet of New Gas Reserves, because by so doing they can relieve themselves of otherwise required cash refunds. Since the ceiling rate level for new gas was somewhat in excess of previously prescribed levels, the additional credit attributable to commitment of this volume of New Gas Reserves might well bring forth a major portion of the total quantity related to refunds, or another 15 trillion cubic feet.

In this instance, the target date was more clearly defined, because the Settlement Proposal requires Section 8.2.2 credits for New Gas Reserves to be established during the five-year period following the Effective Date, subject to relief provisions which producers would naturally not be anxious to rely on, for fear of losing their potential credits.

Thus, the settlement proposal provided by its terms for up to 30 trillion cubic feet of New Gas Reserve commitment, and establishes a specified reward for compliance therewith. From these provisions, it is inferable that the bulk of this gas would be committed within the five-year period subsequent to its full implementation.

Turning to the quantitites needed by the industry, it may be observed that the desired quantities of reserve additions reflected in the Pipeline Purchaser Group study over the five-year span, totals 44.35 trillion cubic feet (V A. 1136).[16]

In order to permit the third supply-eliciting feature of the rate order—the new gas ceiling price—to perform its function, it is necessary for leases to be made available in a normal, regular manner. This is something which the Commission cannot itself control; the most important element is the Federal offshore leasing activity which must be initiated by the Department of Interior, and then must comply with environmental requirements.

In any event, assuming drillable prospects can be provided, the new gas ceiling price, as it may be modified from time to time, would certainly be capable of meeting the 2 to 3 trillion cubic feet per year of additional supply needed to bring the total package to the 45 trillion cubic feet reflected in the requirements target for Southern Louisiana gas over the five-year period (V A. 113e).

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[16] This amount included the findings needed for the intrastate market as well as the interstate market, of course, and thus should be reduced in matching against the quantities likely to be provided from the settlement proposal, which relates solely to the interstate commitments.

D. Petitioners Would Destroy the Supply-Eliciting Features

It is disturbing to note that the portions of Opinion No. 598 which have been brought under attack by petitioners are the very features upon which the purchasers, their distributors, and of course the consumers, must depend if the critically needed additions of new gas are to be found and developed from this prolific gas prone area.

The New York Public Service Commission (pp. 26-34; 40-43), as well as Municipal Gas Distributors (pp. 14-23), have assembled a variety of contentions expressing general dissatisfaction with both the level of the refunds imposed by Opinion No. 598 and also the option to reduce or pay off the refunds through commitment of new gas reserves to interstate purchasers. Mobil Oil Corporation (pp. 34-38) joins in the attack, complaining that some members of their industry will be able to "work off" refunds in gas commitments rather than in cash. If the views of those petitioners are followed, the quantity of gas elicited by the Southern Louisiana Area Rate proceeding for the interstate market will be substantially diminished.

Similarly, these parties complain of the contingent escalation feature of the rate order, which is geared directly to commitment of new gas reserves. (New York, pp. 35-40; Municipals pp. 49-52; and Mobil, pp. 44-53). Unless the new reserves actually materialize, and in the total amount specified in the Commission's order, no escalation will occur.

It was clearly within the bounds of the Commission's power to authorize so sensible an arrangement to elicit the required volume of new supply for the interstate market. The court below was justified in permitting these features of the rate order to stand.

III.

THE ORDER PROPERLY ESTABLISHED THE CHARGES APPLICABLE TO TRANSPORTATION SERVICES PERFORMED BY PIPELINES FOR PRODUCERS IN THIS AREA

The natural gas streams produced from wells in the Southern Louisiana area contain not only dry gas but also liquefiable hydrocarbons and liquids, usually reserved to the producer when it contracts to sell gas to the pipeline purchasers. In most instances, particularly in the offshore area, the producer contracts with the pipeline purchasing the gas, to transport liquids and liquefiables from the well to a processing plant many miles away, where these portions of the stream are removed and retained by the producers.

In *Southern Louisiana I,* the Commission observed that:

> "The processing operation reduces both the Btu content of the gas stream as redelivered to the pipeline and the gas volumes due to the quantities consumed as plant fuel and shrinkage. In these situations where the producer avails himself of an option to process the gas, both the Btu content, for the purpose of the Btu adjustment herein prescribed, and the sales volumes will be required to be measured at the outlet side of the processing plant.
>
> "Additionally, since it is common practice for the pipelines to transport the gas some distance from the fields prior to delivery for processing, we believe it would be appropriate for the pipeline to be compensated for the transportation of the processing fuel, shrinkage losses and other related volumes, as well as any liquids." (40 FPC 530, 611).

Although the New York Public Service Commission argued in that case that the area rate should be reduced to compensate for the transportation performed by the pipeline, the Commission ruled that the record then before it was "devoid of any evidence from which the amount of the charge or offset could be properly calculated"; the Commission therefore placed the parties "on notice" that "in future rate proceedings the Commission may allocate costs to the aforedescribed transportation service being rendered the producers" (*ibid.* at 611).

The Commission also noted that a pending rulemaking proceeding in Docket No. R-338 involved this question on a national, rather than an area, basis. The rulemaking proceeding had not been disposed of, indeed no evidentiary hearings had been held in that matter, when the Southern Louisiana proceeding was reopened. Accordingly, the parties arrived at appropriate charges for these transportation services at the same time they were developing the other portions of the Southern Louisiana area rate structure. The results are set forth in Section 5 of the consensus settlement proposal, entitled "Transportation of Liquids and/or Liquefiable Hydrocarbons for Producers in the Southern Louisiana Area" (II A. 688-9).

Since the cost evidence underlying the transportation charges was in the hands of the pipelines, the Pipeline Purchaser Group undertook the responsibility of presenting witnesses and exhibit material relative to this issue, at the reopened hearings. The witnesses were officials of two pipelines actually engaged in transporting liquids and liquefiables for producers in the Southern Louisiana area, Mr. W. P. Anderson of

Trunkline Gas Company (IV A. 604 *et seq.*) and John L. Moye of Tennessee Gas Pipeline Company (IV A. 609 *et seq.*). These witnesses were cross-examined fully during the hearing (IV A. 642-73), and it was this evidence upon which the Commission prescribed, and the court affirmed, the transportation charges challenged by Mobil.

In view of the fact that this order established the charges for the Southern Louisiana area, the Commission terminated the transportation rulemaking proceeding, Docket No. R-338, *for this area only,* leaving open the level of charges to be established for other areas (II A. 651).

Mobil sought rehearing, and then petitioned to review this aspect of the Southern Louisiana order. It did *not,* as it erroneously claims on brief (Mobil, p. 76), question the imposition of the transportation charge as "collateral" to the rulemaking proceeding in Docket No. R-338. Since that argument was totally absent from Mobil's rehearing application dealing with transportation charges (II A. 770), it cannot be relied on here. *Colorado Interstate Gas Company* v. *FPC,* 324 U.S. 581 (1945).[17]

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[17] In any event, Mobil can scarcely be heard to insist that the transportation charges should have been established in a national, rather than a specific area rate proceeding since one of Mobil's basic complaints concerning the record evidence on which the Commission relied relates to the inclusion of pipeline cost elements beyond the geographic confines of Southern Louisiana (Mobil, pp. 78-9). Mobil's point is frivolous; the pipeline companies involved are those which transport gas in the Southern Louisiana area, and their unit transportation costs must necessarily include all pipeline operations or they would be meaningless.

The court below reviewed the record, including testimony by witnesses for pipelines and for Mobil as to the transportation charges issue, and concluded that the Commission "had a substantial evidentiary basis from which it could conclude that the particular rates which it established should supply a reasonable floor on these charges" (*ibid.* at 911). Obviously, this would have ended the matter but for the Commission's subsequent actions in the rulemaking proceeding (from which the Southern Louisiana aspect had already been severed).

There, the Commission prescribed for the areas other than Southern Louisiana, the same charges it had prescribed here. It did so without evidentiary hearings of any sort. In other words, the procedure followed by the Commission in the rulemaking proceeding was opposite from its careful handling of the issue in Southern Louisiana. Upon review, the District of Columbia Circuit remanded the other order to the Commission, largely because of these procedural irregularities, *Mobil Oil Corporation* v. *FPC,* 483 F.2d 1238 (1973).

Thus, Mobil was successful in convincing the District of Columbia Circuit that an evidentiary record was required. Surely, Mobil cannot validly mount an attack on this feature of the Southern Louisiana order, because there is in *this* record abundant evidence to sustain the Commission's action, as the Fifth Circuit properly held.

CONCLUSION

The Commission complied with all reasonable requirements in establishing a rational area rate structure to replace one which it found wholly inadequate. The Court of Appeals carefully reviewed and extensively discussed the issues presented, arriving at the only possible conclusion—that the Commission's action was within its authority and supported by substantial evidence. The order should be affirmed.

Respectfully submitted,

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March 30, 1974

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IDENTIFICATION OF UNITED DISTRIBUTION COMPANIES

AMERICAN NATURAL GAS SYSTEM
- Michigan Consolidated Gas Co.
- Wisconsin Gas Company

CENTRAL ILLINOIS PUBLIC SERVICE CO.

CITIZENS GAS & COKE UTILITY

COLUMBIA GAS SYSTEM
- Columbia Gas of Kentucky, Inc.
- Columbia Gas of Maryland, Inc.
- Columbia Gas of New York, Inc.
- Columbia Gas of Ohio, Inc.
- Columbia Gas of Pennsylvania, Inc.
- Columbia Gas of Virginia, Inc.
- Columbia Gas of W. Virginia, Inc.
- Ohio Valley Gas Company

CONSOLIDATED NATURAL GAS SYSTEM
- Consolidated Gas Supply Corp.
- The East Ohio Gas Company
- The Peoples Natural Gas Co.
- The River Gas Company
- West Ohio Gas Company

CONSUMERS POWER COMPANY

DAYTON POWER AND LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

INDIANA GAS COMPANY

MICHIGAN GAS UTILITIES COMPANY

NATIONAL FUEL GAS SYSTEM
- Iroquois Gas Corporation
- Pennsylvania Gas Company
- United Natural Gas Company

NIAGARA MOHAWK POWER CORPORATION

NORTHERN ILLINOIS GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

PEOPLES GAS COMPANIES
- The Peoples Gas Light and Coke Company
- North Shore Gas Company

SOUTH CAROLINA ELECTRIC & GAS COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-437

MOBIL OIL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-457

PUBLIC SERVICE COMMISSION OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-464

MUNICIPAL GAS DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

BRIEF OF INTERVENOR UNITED DISTRIBUTION COMPANIES

OPINIONS BELOW

The Opinion of the Court of Appeals (Mobil App. 5-64) is reported at 483 F.2d 880. Opinion No. 598 of the Federal Power Commission (2 J.A. 559-668,

R. 13547-13651) and its opinion on rehearing (No. 598-A, 2 J.A. 866-879, R. 13953-13965) are reported at 46 F.P.C. 86 and 46 F.P.C. 644.[1]

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1972 (Mobil App. 1-2), and petitions for rehearing were denied on June 11, 1973 (Mobil App. 3-4). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTE INVOLVED

The relevant provisions of Sections 4, 5 and 19(b) of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w are set out as Appendix D to the petition in Case No. 73-437 (Mobil App. 65-69).

QUESTIONS PRESENTED

1. Whether the FPC acted lawfully in reopening the *Austral*[2] case and modifying the rate and refund provisions thereof when its previous decision had been affirmed by the court below which stated:

> "... pursuant to our equitable powers we make it part of the remedy of this case that the authority of the Commission to reopen any part of its orders,

---

[1] Copies of the judgment, opinions and orders of the Court of Appeals appear as appendices to Mobil Oil Corporation's petition, which appendices are incorporated herein by reference. The opinions and orders of the Federal Power Commission appear in the printed Joint Appendix in the Court of Appeals of which forty copies have been filed with the Mobil petition.

[2] *Austral Oil Company* v. *FPC*, 428 F.2d 407, aff'd. on rehearing 444 F. 2d 125, cert denied, 400 U.S. 950 (1970) (hereinafter referred to as *Austral*).

> including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so." 444 F.2d 125, 126

and this Court denied certiorari. 400 U.S. 950. In other words, did the Commission act lawfully in doing, after certiorari was denied, what the court below said it could do?

2. When independent producers are selling natural gas to pipeline companies and the purchasers are transporting commingled liquids for the producers from gas wells to processing plants, does the Commission have authority to fix the price charged for transportation of such liquids or may the producer circumvent FPC rates and defeat its jurisdiction by negotiating with the natural gas purchaser for transportation of such liquids by the purchaser at less than cost?

3. When the cost evidence showed a flowing gas cost range extending from below to well above twenty-two cents per Mcf, did the Commission act properly in finding a flowing gas price of twenty-two cents and including fixed and contingent escalations?

4. When the evidence showed that refunds could be forgiven entirely, but producers subject to refund requirements accepted a settlement requiring $150,000,000 in refunds and allowing the work-off of this sum by the dedication of new gas to interstate commerce, did the Commission in so ordering, act properly?

5. Whether the Commission may establish moratoria on rate changes under Section 4 of the Natural Gas Act where it has, on the basis of substantial evidence, provided for (a) the retention of large amounts of capital

through the refund discharge program, and (b) periodic and contingent escalations as a protection against rising costs?

6. Whether the Commission may provide industry and area-wide rate stability for a period of at least five years, where the individual producers have other available methods for seeking deviation from the applicable area rates?

7. When there is a possibility that some producers may be required to pay some royalties computed on bases exceeding the producers' effective rates, must the Commission make allowance for the recovery of such possible royalty payments or may it ignore such a possibility until the cost is actually incurred?

8. When Section 4(e) of the Natural Gas Act says the Commission "may" require refunds and "may" is used in juxtaposition to "shall" in the statute and when the legislative history indicates that Congress meant to confer discretion and when the courts have held that "may" as used in the particular statute confers discretion, should the court below have held that "may" is mandatory?

COUNTERSTATEMENT OF THE CASE

The Parties.

There were 513 parties to the proceedings before the Federal Power Commission, and there are only three appeals pending from the ultimate resolution of this most complex proceeding.

The 32 gas distribution companies listed on the fly leaf are engaged in the distribution of natural gas in several states to approximately 10.3 million metered customers. They comprise approximately 25% of the

public utility gas distribution operations throughout the United States. The major cities served by these companies include Chicago, Decatur and Springfield, Illinois; Jackson and Monroe, Michigan; Lafayette and Indianapolis, Indiana; Dayton and Columbus, Ohio; Pittsburgh, Pennsylvania; Buffalo, Syracuse, and Albany, New York; and Charleston and Clarksburg, West Virginia. Because they were no longer able to obtain the gas supplies required by the demands of the consumers they serve, they formed an *ad hoc,* voluntary group called the United Distribution Companies (UDC) for the purpose of participating in these proceedings before the Commission.

Procedural Background.

On May 10, 1961, the Commission issued an order initiating proceedings in the first Southern Louisiana Area Rate Case, AR61-2. (25 F.P.C. 942) On September 25, 1968, it issued its Opinion No. 546 and on March 20, 1969, it issued its Opinion No. 546A on rehearing and simultaneously initiated a new Southern Louisiana proceeding in AR69-1. Opinion Nos. 546 and 546A in the first proceeding were appealed to the U. S. Court of Appeals for the Fifth Circuit and a decision affirming the Commission's order was issued on March 19, 1970. *Austral, et al.* v. *FPC,* 428 F.2d 407 (1970).

The Court stated,

> "The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We specifically and emphatically reject the contention advanced by the MDG that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous." (428 F.2d at 444-5)

Several applications for rehearing were filed and on May 11, 1970, the court below directed the Federal Power Commission to respond to the petitions for rehearing and in its response to deal with the following questions:

> "(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable."
>
> "(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

The Commission's response stated that it had no authority to prescribe or permit retroactive rate changes, and the courts have no authority to order reparations under the Natural Gas Act. The Commission concluded:

> "In order that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion, a remand is respectfully requested."

Thereafter on June 16, 1970, the court below issued its opinion on the applications for rehearing in which it stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere

> in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so." 444 F.2d at 126

Petitions for certiorari were filed by the Municipal Distributors Group (MDG), the Public Service Commission of New York (PSCNY) and others challenging the authority of the court below to authorize the Commission to reopen an opinion which had been affirmed and to make retrospective adjustments to the rates therein prescribed. This Court denied certiorari. 400 U.S. 950 (1970) Thereafter the Commission reopened the proceeding in AR61-2.

In the proceeding below, there were extensive hearings, comprising 57 volumes of transcript and including 111 exhibits exclusive of that part of the record relating to proceedings prior to the *Austral* decision.

UDC offered evidence showing: (1) the causes and magnitude of the gas shortage, (2) the exploratory effort and capital expenditures necessary to meet future requirements, (3) the cost of producing gas, (4) the inadequacy of past rates to meet costs and (5) the significant lagging of gas prices behind inflationary trends. UDC also presented evidence showing that the annual increments of new gas supply required by its member companies but not available for purchase, for the years 1970 through 1975, total 3.3 trillion cubic feet. (3 J.A. 2-9, R. 886G-886N)

Executives of UDC member companies testified as to their inability to purchase the required volumes of

natural gas. (3 J.A. 9-63, R. 887-898, 900-910, 912-918, 920-923, 925-936, 938-954)

On April 1, 1970, the Administrative Law Judge convened a settlement conference in accordance with Commission Rules and negotiations were conducted, concurrently with the taking of evidence, looking toward a settlement of the issues.

On November 6, 1970, UDC filed with the Commission an offer of settlement which is attached to the FPC Order (2 J.A. 675, R. 13665) together with a motion for promulgation thereof. (2 J.A. 669, R. 13652) The motion averred that the proposed settlement had the support of most "but not all" of the parties.

All 513 parties were given an opportunity to respond. In addition to UDC, the settlement was supported by the Staff of the Commission, the Associated Gas Distribution Companies which serve about 10 million customers at retail, by all interstate pipelines purchasing gas from the Southern Louisiana Area and by 46 natural gas producers comprising 80% of the total gas production flowing from the area. (2 J.A. 589, R. 13575-6)

Opposition to the UDC Settlement Proposal was voiced only by Mobil, Amoco, PSCNY and MDG—a very small minority of the parties. (2 J.A. 589-590, R. 13576)

The Commission made the Settlement Proposal a part of the record and set the matter for further hearing. (2 J.A. 589, R. 13575) All parties were given full opportunity to submit additional evidence specifically addressed to that proposal.

UDC submitted evidence of the witness Baker Clay showing, among other things, the inadequacy of prior

rates. (4 J.A. 706-722, R. 6833-6850, Exhibits 90-93; 5 J.A. 233e-241e, R. 10629-10637) Mobil Oil Corporation (Mobil) and the Municipal Distributors Group (MDG) introduced evidence in opposition to the settlement. Commission Staff evidence also supported the settlement. Briefs and reply briefs were filed by parties supporting and by parties opposing the settlement.

The Commission issued its Opinion No. 598 on July 16, 1971, adopting provisions similar to those included in the settlement. In Opinion No. 598 the Commission held that its Opinion No. 546 served no further office. After applications for rehearing were filed, Opinion No. 598-A was issued on September 9, 1971, modifying and affirming Opinion No. 598. The Commission's orders were supported by findings based upon the record, including evidence submitted before and after the settlement proposal was filed.

The case was appealed to the United States Court of Appeals for the Fifth Circuit which found no error.

SUMMARY OF ARGUMENT

I.

The evidence before the Commission in the reopened record showed that there is a gas supply crisis; that there has been a decline of more than one billion dollars per year in funds devoted to exploration for hydrocarbons; that substantial amounts of money will be required to reverse the downward trend in the discovery and production of natural gas; that the rates prescribed in Opinion No. 546 (Southern Louisiana I) were unreasonably low; that the crude oil incentive is no longer adequate to bring about the exploration needed to find gas reserves and that gas must stand on its own feet.

The evidence showed that the cost findings in Opinion No. 546 were unreasonably low and that it is possible to find costs only within a range. The Commission properly found that Opinion No. 546 rates were not just and reasonable and did not produce sufficient return, that such opinion should be set aside, and that the refunds required therein should not be made.

II.

The Commission fixed rates within a zone of reasonableness coupled with fixed escalations and provided further incentives for the discovery and dedication of natural gas to the interstate market. It allowed a work-off of refunds at one cent per Mcf for new dedications of gas to the interstate market and provided further escalations in the ceiling prices contingent upon the dedication of certain specified volumes to the interstate market. These incentives are desperately needed. Only experience can tell whether they are adequate. The Commission concluded, on the basis of substantial evidence, that there is a strong positive relationship between price and supply, particularly between price and exploratory effort. The record is clear that there is a need for the incentives. The producers of most of the natural gas in Southern Louisiana stated that the settlement, which the Commission approved, would provide incentives for further exploration and further dedications of natural gas to the interstate market.

Mobil, which had previously settled its rate cases and made refunds, complains that the order is discriminatory because it gives other producers an opportunity to work off their refunds rather than refund them as did Mobil. There is no way, however, that they can be treated the same because they are not in the same situa-

tion. Mobil had voluntarily taken the risk that it might be worse off if it settled than if it litigated its cases. After litigation, the record showed that an order reducing the area rates to the level of Mobil's individual settlements would be confiscatory on an area-wide basis. Consequently, the Commission had no power to cast the other producers in Mobil's mold.

MDG and PSCNY also join in alleging that the order is discriminatory. Their allegations are not based on any showing of actual injury as claimed by Mobil, but rather on hypothesis and prognostication. No evidence was offered to support their conclusion that the incentive provisions would discourage new entrants into the market. Moreover, no consideration was given to existing Commission programs such as that offered by F.P.C. Order No. 455 which would permit new entrants to seek higher rates under an alternate procedure.

III.

Mobil contends that the Commission exceeded its authority in fixing rates by the pipeline purchasers for the transportation of commingled liquids owned by the producers. These rates were fixed on the basis of substantial evidence in order to preserve the Commission's jurisdiction over the price of gas. Liquid hydrocarbons are often mixed with gas at the wellhead and must be transported from the platform to a processing plant in a mixed stream. If the producer could negotiate for transportation of commingled liquids by the pipeline purchaser at less than cost to such purchaser, clearly the Commission's jurisdiction would be circumvented. The real price received for the gas would be greater than the lawful rate of 26 cents per Mcf. If the Commission could not fix a rate for the transportation of

liquids by the pipeline purchaser, it could not regulate the wellhead price of natural gas.

IV.

Mobil complains that the Commission placed a five-year moratorium on deviation from the area rates fixed in this proceeding. A moratorium was upheld by this Court in the *Permian*[3] case where costs were found to be stable. In this case costs were not found to be stable and the Commission provided fixed escalations in the price of gas. It also fixed contingent escalations. Furthermore, it has provided in its rules a method by which a producer may petition for authority to deviate from the area rate ceilings. Surely, as this Court held in *Permian,* the Commission cannot be required to start a new rate case every time an old one is concluded.

V.

MDG contends that the Commission is required by the statute to order refunds and that the court below erred in holding that "may" as used in Section 4(e) of the Natural Gas Act[4] confers discretion. It contends that "may" as used in the statute should be construed as "shall."

This Court stated in *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank,* 262 U.S. 649, 662-3 (1923), that

> "It is true that in statutes the word 'may' is sometimes construed as 'shall.' But that is where the context or the subject matter compels such construction."

---

[3] *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), (Hereafter referred to as *Permian*).

[4] 15 U.S.C. § 717c.

The legislative history shows that Congress meant "may" as used in Section 4(e) to be permissive. The courts have held that it does convey discretion upon the Commission. Furthermore, there is a great body of law holding that where "may" and "shall" are both used in the same statute, they are to be given their ordinary meaning. Significantly, "shall" appears five times in Section 4(e) of the Natural Gas Act along with the "may" in question. MDG's argument is completely without merit.

VI.

The decision of the U. S. Court of Appeals for the District of Columbia in the *Texas Gulf Coast Area Natural Gas Rate Case, P.S.C.* v. *Federal Power Commission,* 487 F.2d 1043 (D.C.Cir. 1973), reversed an order of the Federal Power Commission which reached a similar result to that reached below, but on a substantially different record. The Texas Gulf Coast case, relied upon by Petitioners, is distinguishable from the decision below because of the absence of (a) Commission analysis and (b) a substantial basis in the record for the Commission's decision. The Commission's decision in the instant case was made on the basis of an extensive record, detailed analysis, and findings.

ARGUMENT

INTRODUCTION

This Court observed in *Permian,* 390 U.S. 747 at 756, that since 1954 the Commission has labored with obvious difficulty to regulate a diverse and growing producing industry under the terms of an ill-suited statute.

When the Commission attempted to regulate rates on a company-by-company basis, the administrative proc-

ess broke down. (390 U.S. at 758) Since 1960 it has been attempting to regulate producers on an area basis, but area rate cases take a long time and conditions change.

In this proceeding the Commission was no longer just trying to keep rates to consumers down, but was confronted with the equally important problem of trying to obtain adequate gas supplies for a market suffering from shortages.

As observed by Justice Jackson in a separate opinion in *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591, 647 (1944), the exploration for and the production of natural gas are more erratic and irregular and unpredictable in relation to investment that any phase of any other utility business.

Producers are not required to invest in the high-risk, speculative adventure of searching for natural gas. They may do so and it is the Commission's responsibility to fix rates that will encourage them to do so.

It is necessary then that pragmatism be accompanied by innovative approaches if the Commission is to succeed in its task of steering between the Scylla of excessive rates and the Charybdis of not enough gas for the consumer.

As this Court pointed out in *Permian, supra,* at p. 798, the Commission's responsibilities extend to future customers as well as present customers. It has an obligation to provide an effective incentive to the exploration for natural gas as well as to prevent excessive producer profits. We believe it cannot be gainsaid that if past profits had been excessive there would have been no decline in exploration activity. Since the first

Southern Louisiana Area Rate Case, evidence has proved to the Commission that its past regulatory techniques have been unsuccessful in protecting the public interest in an adequate supply of gas.

In the second Southern Louisiana case, here involved, the Commission adopted a new, many-faceted approach designed to stimulate production and to encourage producers to dedicate new reserves of natural gas to the interstate markets. The Commission has attempted to harness cost and noncost factors side by side. (*Permian, supra,* at 815) And it has employed a combination of formulae in an attempt to cope with its intensely practical problems. (*Permian, supra,* at 790)

Nearly all parties to the proceeding below recommended this approach, but a few object. PSCNY and MDG want the refunds that would have been made under the Opinion 546 approach. Mobil wants higher rates for the future to offset the inadequate rates it voluntarily accepted in past settlements. Each of the Petitioners attack individual segments of Opinion No. 598 as if each segment stood alone. No Petitioner evaluates Opinion No. 598 as a totality.

The record shows that this nation is dependent upon Southern Louisiana for one-third of its natural gas requirements, that the amount of money devoted to exploration and development has declined sharply, resulting in a decline in the discovery of new gas reserves, and that enormous amounts of money will be required to reverse such decline.

For these reasons the Commission found cost-based rates within the zone of reasonableness for both vintages of gas, the work-off of refunds by the dedication of new reserves, and price escalations based upon new

dedications coupled with fixed escalations to offset inflation, to be just and reasonable. The Court below properly held that the Commission's order was supported by the record and that it was within its statutory authority.

I.

THE COMMISSION PROPERLY EXERCISED ITS AUTHORITY ON THE BASIS OF SUBSTANTIAL EVIDENCE IN THE RECORD TO REVIEW AND REVISE THE RATES AND REFUND PROVISIONS CONTAINED IN THE FIRST SOUTHERN LOUISIANA RATE CASE, OPINION NOS. 546 AND 546-A.

A. The Basic Premises of Opinion No. 546 Have Been Shown To Be Groundless.

Opinion No. 546 was based upon four incorrect premises. The Commission concluded on the record then before it: (1) that the supply situation was satisfactory, (2) that costs in 1968 had not increased since the 1960 test year and would remain stable, (3) that the rates prescribed were adequate to cover costs, and (4) that the rates fixed would elicit the required supply of gas. Experience and evidence in the new record show that these conclusions were wrong.

B. Compelling Evidence in the Reopened Record Shows, and the Commission Properly Found, a Serious Shortage of Natural Gas.

The Commission's Opinion No. 598 includes a comprehensive analysis of the supply and demand situation in Paragraphs 40 through 106 (2 J.A. 601-630, R. 13587-13615); and these findings are clear, convincing and predicated on substantial evidence.

We will here summarize the evidence presented by the UDC Group which, even if there were no corrobora-

tive evidence, would adequately support the Commission's findings.

1. *UDC Supply Shortage.*

R. H. Sarikas presented a comprehensive study (3 J.A. 2-9, R. 886G-886N, Ex. No. 1) showing the annual increments of new supply not now available for purchase but required by UDC Companies for their twenty-five percent of the industry for the years 1970 through 1975, as follows:

Increments in 1000 Cubic Feet of New Gas Not Now Available But Required to Meet Market Requirements of UDC Group

	Annual	Peak Day
1970	72,177,000	286,000
1971	260,139,000	965,000
1972	460,139,000	1,886,000
1973	657,248,000	2,751,000
1974	824,047,000	3,670,000
1975	1,025,626,000	4,618,000
Total 1970-1975	3,302,278,000	14,176,000

The executives of several UDC members testified as to their inability to purchase the additional increments of new gas urgently required. They strongly recommended prompt and forceful correction of Opinion No. 546.

These witnesses were:

H. D. Borger, Consolidated Natural Gas System (3 J.A. 19-30, R. 900-910); F. W. Batten, Columbia Gas System (3 J.A. 9-18, R. 887-898); Herbert D. Clay, National Fuel Gas System (3 J.A. 31-35, R. 912-918); H. E. Ford, Northern Illinois Gas Company (3 J.A. 36-39, R. 925-936); John B. Simpson,

Consumers Power Company (3 J.A. 39-50, R. 925-936); Joseph P. Thomas, Peoples Gas System (3 J.A. 51-63, R. 938-954).

2. *UDC Evdence of Shortage in the Field.*

John G. Winger, Vice President of the Chase Manhattan Bank and Manager of its Energy Economics Division testified on behalf of UDC. He presented a comprehensive analysis of the supply situation and testified that the United States is faced with a gas shortage of critical importance to the consumer, the distributor and the national interest. (3 J.A. 175, R. 1454 and 4 J.A. 477, R. 4787)

The Winger testimony traces the history of the gas shortage to a decline in exploratory effort in the 1950's. He testified that enormous amounts of capital will be required to reverse the situation.

3. *Decline in Proven Reserves.*

The Chairman of the American Gas Association Committee on Reserves testified with respect to the AGA reserve estimate for December 31, 1969, showing, as did the 1968 study, a continuing and drastic decline in proven reserves. (3 J.A. 128-172, R. 1411-1450 Ex. No. 49, 5 J.A. 123e-129e, R. 9991-9997)

In *Permian,* issued in 1965,[5] the Commission discussed a reserves to production (RP) ration of 17.5 based on 1960 data. By 1969 it had declined to 13.1 (4 J.A. 676, R. 6765)

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[5] *Area Rate Proceeding (Permian Basin Area),* 34 F.P.C. 159 (1965).

C. The Area Rates Prescribed by Opinion No. 546 Were Unreasonably Low and Would Not Provide Sufficient Incentive.

In Paragraphs 92 through 103, Opinion No. 598 (2 J.A. 624-630, R. 13608-13615) found that much greater incentives than those provided by Opinion 546 are needed to reverse the downtrend in exploration and development. The Commission relied heavily on the evidence of UDC witness Winger, a Vice President of the Chase Manhattan Bank in charge of its Energy Economics Division, whose testimony we will summarize below. And, on the new evidence, the Commission made cost findings materially different from those of Opinion No. 546 (Paragraphs 107 through 158; 2 J.A. 630-648, R. 13615-13632), and held that Opinion No. 546 serves no further office. (2 J.A. 587, R. 13546)

1. *These Findings Are Supported by Evidence that the Supply Crisis Resulted from a Drastic Falling Off in Expenditures for Exploration.*

A comprehensive study of the past reveals that a combination of factors was involved in creating the present supply crisis. All such factors influenced the key problem—insufficient money was devoted to exploration.[6] UDC expert witness Winger's extensive testimony on this problem showed that the supply crisis can be overcome only through increased prices for both flowing gas and new gas.

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[6] There is a semantic problem throughout this case. Invested capital earns a return but risk capital on unsuccessful ventures does not. Exploration funds are expensed and written off, if they are not invested in successful wells. Consequently, the problem is to attract "capital" for exploration, a major portion of which will be expensed and never produce income, because most exploratory wells are dry.

The lingering effects of the great depression in the early thirties, a business recession in 1938, and large scale discoveries of new reserves together caused the price of domestic crude oil to be severely depressed immediately prior to World War II. And it was frozen at that level by the price controls imposed during the War. With the lifting of the restrictions in mid-1946, the price of domestic crude oil began to advance. Between early 1946 and early 1957, the average price rose from $1.22 to $3.17 per barrel. At the same time, the demand for domestic crude oil was growing at a healthy rate of 4.3 percent a year. Together, those developments caused the well-head value of the nation's petroleum production to increase nearly fourfold. As a result, the industry had a rapidly expanding financial base from which to generate capital funds. And it also had the incentive to reinvest those funds in the search for more domestic oil and gas. (3 J.A. 177, R. 1455)

Immediately following World War II, the industry was spending 1.5 billion dollars a year for such exploration and development. The major companies as one group and the smaller producers as another were each spending almost identical amounts. And, for the next decade, both groups progressively increased their rate of spending. By 1957, industry-wide spending was in excess of 5 billion dollars per year.

But, in the following year, the industry reduced such outlay by nearly 1 billion dollars. And, for the next decade, the annual rate of spending for domestic exploration and development remained on a plateau of 4.25 billion dollars a year. (3 J.A. 176-177, R. 1456)

The causes in the decline in exploratory effort, through a reduction in money devoted to this purpose

arose from an absence of incentives as to both crude oil and natural gas.

(a) *The Absence of Crude Oil Incentive.* In past decades most gas discoveries occurred in the course of the search for crude oil, which provided the major incentive for capital expenditures. (3 J.A. 177, R. 1457)

The industry is now able to predict with a high degree of success whether new reservoirs will contain gas or oil before they are explored. (3 J.A. 319, R. 3439, Ex. 42, 5 J.A. 117e-121e, R. 9349-53) Consequently, if they do not have an incentive to search for gas they will not find substantial quantities of gas accidentally while searching for oil.

(b) *Low Natural Gas Revenues.* The increase in gas sales after development of the large diameter pipelines did not provide sufficient incentives for capital investment in drilling. From 1956 to 1969, 205 trillion cubic feet of natural gas were produced and sold generating 23 billion dollars of revenue, or 16 billion dollars less than costs. (3 J.A. 178-179, R. 1458-59) Much of this gas had been found while searching for oil and the producers had to get what they could for it, but they did not have to spend money in a directional drilling effort to find new gas supplies.

Through by-product pricing the great post-war gas reserves were given away, and the Commission's past use of formulae which minimized the costs assigned to gas made a directional search of the magnitude required by the public interest unattractive to producers. (3 J.A. 180, R. 1460)

2. *Natural Gas Must Provide Its Own Incentive*

The search for natural gas can no longer be viewed as incidental or proportional to the search for domestic crude oil. Directionality or the ability of companies to maintain a high degree of predictive accuracy in their directional search capability for gas or oil is demonstrated by Exhibit 42, Schedules 1 and 4, which show that on the basis of statistics covering 22 companies and 6,142 wells, the composite predictive accuracy of the various groups of reporting companies falls within the range of 85 to 87 percent. Witness Allen testified that any producer with an adequate geological staff can conduct a search for gas reservoirs separate from the search for oil reservoirs. (3 J.A. 319, R. 3439, Ex. 42, 5 J.A. 117e-121e, R. 9349-53)

3. *The Supply Crisis Can Be Overcome Only Through Increasing the Money Devoted to Exploration for Natural Gas.*

During the past 10 years, the industry has actually found less crude oil and other liquids than the nation has consumed. (3 J.A. 182 *et seq.*, R. 1462 *et seq.*) For several years, it has found less gas than the market required. Market growth is now being curbed, and existing customers are being curtailed.

The unrefuted evidence shows there is a close relationship between the amount of money invested in the search and the amount of new reserves actually found. (3 J.A. 182, R. 1462)

In terms of results achieved in the past, the industry would have had to spend $37 billion more than it actually did to prevent the decline in reserve ratios that occurred over the past 12 years. The evidence shows that industry can be expected to provide only about 55

percent of the market needs for natural gas by 1980 unless current levels of spending are increased. (3 J.A. 175-176, 184, 4 J.A. 496, R. 1455, 1465, 4830)

4. *Evidence in the New and Reopened Proceeding Shows That the Costs of Gas Found by the Commission in Opinion No. 546 Were Unrealistically Low and the Commission, on the New Cost Evidence, Properly Found Higher Cost Ranges.*

In Opinion No. 546, the Commission found the national average cost of new gas (including the Louisiana Severance Tax) to be 18.80¢ per Mcf. (40 F.P.C. 530, 589 (1968)) It found the cost of flowing gas to be 18.36¢ per Mcf. (40 F.P.C. at 603) Evidence in the reopened record shows that costs substantially exceeded these findings and in its discussion in Paragraphs 107 through 158 (3 J.A. 630 through 648, R. 13615 through 13632) the Commission has now found that the reasonable range of costs is at a materially higher level for both new and flowing gas.

In support of these findings, there is a wealth of new cost evidence in the new record—presented by experts for the Staff, UDC and the producers. This evidence clearly supports the need for modifying the unrealistic costing methodology of Opinion No. 546.

UDC witness Larson's testimony shows that, whereas the Commission in Opinion No. 546 felt that exact costs could be determined, in fact, this very complex costing determination could be determined only within a range or zone of reasonableness.

The Commission, the reviewing courts, and the parties have long recognized that one of the most critical and influential costing problems lies in the allocation of general costs incurred by the producer

jointly for both oil and gas. The costs—particularly for exploration and development—are large; and there is no God given maxim as to what portion is properly attributable to oil and what portion to gas. In its *Permian* Opinion No. 548, the Commission adopted the concept that a Btu of oil was worth 3½ times as much as a Btu of gas and so it allocated 3½ times as much of these joint costs to a Btu of oil as it did to a Btu of gas. (4 J.A. 539, R. 5934-5) This was perfectly circular reasoning because the value of gas was exactly the point at issue. And quite obviosly the result lay in the concept that gas is a cheap by-product to be sold at distress prices. The result was the low, bargain basement prices adopted in *Permian* and approved by the Courts as an experiment.

In Opinion No. 546 issued in 1968, the Commission continued this same approach, using the *Permian* figures as a basis for allocation in South Louisiana. But this distress sale approach to valuation is wholly at war with realities. When supply shortages require that the industry go out and explore for gas, gas must be valued realistically or there will be no exploration.

This is why UDC witness Larson presented allocations of joint costs in which the value of gas is considered to be one-half the value of oil or equal to the value of oil—not just the one-third concept used in *Permian* and Opinion No. 546. Using such techniques, the witness Larson demonstrated that whereas the by-product, bargain basement concept of Opinion No. 546 resulted in a cost of 18.3¢ per Mcf for flowing gas, cost reasonably and justifiably fall in a range from 18.3¢ up to 27.6¢ per Mcf. (Ex. No. 56, 5 J.A. 176e, R. 10232) The evidence of UDC witness Ogden shows that the cost for new gas comes to 27.58¢ per Mcf when

joint costs are allocated on the basis that oil is twice as valuable as gas. (Ex. 57, 5 J.A. 178e, R. 10234)

In view of (a) the evidence of Mr. Winger with respect to the funds that must be devoted to the search for gas, if we are to cope with our present critical gas supply shortage, and (b) the evidence of Messrs. Vaughn and Allen, *infra,* showing that the industry is capable of making a directional search for gas as distinguished from oil, the Commission properly found that this "by-product" approach to costs should be abandoned.

The New York Commission, which opposed any deviation from Opinion No. 546, except for new gas, submitted no evidence at all. It follows Opinion No. 546 without any new support for its position.

Evidence offered before the Commission by MDG with respect to the cost of gas slavishly followed Opinion No. 546 on the theory that those methods determine cost with pinpoint accuracy. Those methods have been found to be unreasonable on the basis of the new evidence of other competent witnesses. MDG's whole case in support of Opinion No. 546 therefore comes tumbling down.

In its brief MDG contends that the Commission said it was assigning only one cent more to Exploration and Development cost by a certain change in allocation procedure when in fact the difference was 3 cents. (MDG Brief p. 27-8) The Commission language quoted at page 27 of MDG's Brief refers to two changes in allocation procedures: (a) the modified Btu method discussed above, and (b) the direct assignment method.

As pointed out above, Opinion No. 546 assigned 3½ times as much cost to a Btu of oil as to a Btu of gas. In Opinion No. 598 it used 2½ times. Witness Murr's

Exhibit No. 77, Schedule 5 (5 J.A. 219e, R. 10538) shows that this change makes a difference of one cent per Mcf. This is the one cent per Mcf to which the Commission referred in the language quoted at page 27 of MDG's Brief.

The direct assignment method involves the direct assignment of costs to reservoirs to the extent possible. This was not done in Opinion No. 546 because the Commission did not have the data; but it was done in Opinion No. 598. Mr. Murr's Exhibit 77, Schedule 5 (5 J.A. 219e, R. 10548) shows that this step in the procedure made a difference of 2 cents per Mcf in the allocation of Exploration and Development costs.[7]

Clearly, the Commission's departure from Opinion No. 546 is well supported by new evidence and is entirely proper. The overwhelming weight of producer, pipeline and distributor evidence shows that the Opinion No. 546 rates were clearly against the public interest and the interest of the millions of consumers dependent on the industry.

D. Compelling Evidence in the New and Reopened Proceeding Shows, and the Commission Properly Found, that the Opinion No. 546 Rates Produced Insufficient Return and that Opinion No. 546 Refunds Should Not Be Required.

In Paragraph 171 (2 J.A. 653, R. 13638), the Commission found that Opinion No. 546 did not provide adequate return; and in light thereof, it altered the refund requirements.

We call attention to the very substantial support for this key finding not only in the elaborate cost analysis

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[7] The figure of 6.70 cents shown for E & D on page 28 of MDG's Brief is equivalent to the figure of 6.574 shown on Mr. Murr's Exhibit adjusted for a different pressure base.

in the Commission's Opinion, but also in the evidence of UDC witness Baker Clay which was before the Commission in the new and reopened proceeding.

Mr. Baker Clay showed that the revenues at Opinion No. 546 rates, if enforced, would fall below the range of reasonable costs. (5 J.A. 176e, R. 10232) It shows that Opinion No. 546 revenues would drop below the lowest range of costs in 1961 and stay below such costs for the remainder of the period. For approximately 1½ years in 1960 and 1961, such revenues were slightly above the lowest cost range, but very substantially below the middle cost range.

MDG offered evidence purporting to show that there had been no increase in costs from 1960 through 1969, and contended that the Opinion No. 546 cost determinations based on the year 1960 were correct.

There is an abundance of evidence that costs have not been stable. Mrs. Gody's Exhibit No. 58 (5 J.A. 191e, R. 10246) and Mr. Sherwin's Exhibit No. 63, Schedule 3 (5 J.A. 196e, R. 10323) show that the cost of drilling wells has increased astronomically since 1960. Mr. Sherwin's Exhibit No. 63 also shows that from 1961 to 1968 the cost of gas production increased approximately one-third. (5 J.A. 199e, R. 10328) These costs trends are confirmed by Mr. Larson's Exhibit No. 56. (5 J.A. 176e, R. 10232)

The entirely new appraisal of costs, the changed situation as to supply, the need for new exploration, the Clay comparison of revenues to costs—all these elements—clearly justified the Commission's departure from the refund effects of Opinion No. 546.

MDG, nevertheless, contends that there is not a shred of evidence in this case that the return allowed in

Opinion No. 546 was inadequate, (Brief p. 26) and PSCNY contends that if future prospective earnings are adequate, capital required for Exploration and Development will be available. (Brief page 23-25)

Both of these arguments, one of which is based on another Court decision with respect to which a petition for certiorari is pending, ignore and are refuted by the evidence in this record. Mr. John Winger testified that the natural gas shortage was caused by a combination of factors. "But, to varying degrees, they all influence the key problem—the formation of capital. It was the industry's over-all relative inability to generate enough capital that has led to a shortage * * *" (3 J.A. 175-176, 4 J.A. 496, R. 1455, 4830)

Mr. Winger further testified:

> "In terms of the results achieved in the past, the oil and gas industry would have had to spend 90 billion dollars—or 37 billion more than it actually did—if it had tried to prevent the decline of reserve ratios that has occurred over the past 12 years."

Under present circumstances and absent additional incentives, Mr. Winger concluded there is no basis for thinking that industry would be able to invest the amount of money required to develop needed reserves. (3 J.A. 183, R. 1463)

The record shows that at current levels of spending, the industry can be expected to provide only about 55 percent of the market needs for natural gas by 1985. (3 J.A. 184, R. 1465)

Mr. Winger's evidence, which is unrefuted in the record, shows that much more money must be devoted

to the search for natural gas if we are to meet our requirements and this can be done only if industry is permitted to generate capital from operations. (3 J.A. 184-194, R. 1465-1475, R. 4797-4798)

On a world-wide basis there is a shortage of capital. Bankers have had to say no to perfectly sound loans because of a shortage of funds. (4 J.A. 490, 4808)

"Independent producers have cut their capital outlay in the United States to one-half of what it was in the mid-fifties." (4 J.A. 493, R. 4814-15)

The statement by the U.S. Court of Appeals for the District of Columbia in the Texas Gulf Coast Case quoted by the Public Service Commission of New York at page 24 of its Brief, with respect to the availability of capital, does not reflect the unrefuted evidence in this record that capital must be generated from operations or the natural gas shortage will get much worse.

MDG argues that capital should not be internally generated by the gas producing industry on the ground that this is contrary to "traditional utility concepts." (Brief p. 36 *et seq.*) This argument begs the question because as this Court observed in *Permian,* "Producers of natural gas cannot usefully be classed as public utilities." (390 U.S. at 756) Producers have traditionally raised capital in this manner. In recent years not enough funds have been attracted to maintain the level of reserves required for adequate service. Rates should allow sufficient reserves to attract adequate capital to the enterprise. *Bluefield Water Works and Improvement Co.* v. *P.S.C.,* 262 U.S. 679, 692-695 (1923). A traditional utility must have earnings to assure confidence and enable it to attract capital. *United Railways & Electric Company* v. *West,* 280 U.S. 234 (1930)

Adequate capital is not flowing into the production business.

Alabama-Tennessee Natural Gas Co. v. *Federal Power Commission,* 359 F.2d 318 (5th Cir. 1966) cert. denied 385 U.S. 847 (1966), cited by MDG (Brief p. 37) is inapposite. That was not a producer case. The Court there discussed capital for plant and equipment —not for discovery of natural gas reserves. No return is allowed on proved reserves. No value is placed on such reserves for ratemaking purposes. They are not in the rate base. Only the plant and equipment is in the rate base and that at net original cost. Nothing is allowed for replacement costs. Furthermore, traditional regulatory concepts design rates to recover costs on a past test period and under traditional concepts revenues equal to past costs are expected to make the utility whole in the future. But such concepts cannot be applied strictly to the producing industry. They fail to provide funds for drilling deeper wells or exploring the less favorable prospects after the cream has been produced.

In periods of capital shortage, when gas reserves are so low that there must be an astronomical increase in moneys devoted to exploration, it would not be sound regulatory policy to follow MDG's suggestion and cut off the traditional source of such funds—internally generated capital. This would—as it has—deprive the public of a major source of energy.

The end result test of *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944) is applicable here. Under Commission regulation since 1954, the natural gas reserves to production ratio has declined to the point where adequate service is not available. There has been a decline in expenditures for explora-

tion and insufficient capital is available. Under the Hope doctrine a change is called for because the end result has been tragic. The Commission has recognized these facts, which are shown by the evidence, and has here taken corrective action.

MDG advocates refunds and lower prices whereas the parties to the settlement and the Commission are motivated by efforts to obtain adequate service. FPC Staff witness Engel testified that the maintenance of adequate gas service by the producing industry is the most serious issue which must be considered. (4 J.A. 675-676, R. 6764, 6765)

The Public Service Commission of New York argues at page 36 of its Brief and MDG argues at page 33 *et seq.* that increased revenues from flowing gas are not necessary or even useful in enhancing the producers' exploration effort, but the evidence of Mr. Winger squarely supports the Commission's conclusion to the contrary.

MDG also criticizes the Commission for fixing a rate of 22.375 cents when the Staff computed a cost of only 21.18 cents (Brief p. 32) MDG ignores the fact that the Staff's 21.18 cents, when adjusted to a 15 percent rate of return, which the Commission allowed, equates to 22.21 cents, which is very close to the rate allowed.

E. The Evidence Supports the Revision of Refunds.

The Commission's Opinion No. 598 deals with refunds in Paragraphs 169 through 172 (2 J.A. 652-654, R. 13635 through 13638) and, in the light of the inadequacies of Opinion No. 546, and the evidence in the record, it adopted the compromise worked out by the proponents of the Settlement on the basis of its merits.

On the basis of the substantial evidence in the record this action was entirely justified.

As pointed out above, the testimony of witness Baker Clay showed that revenues at the Opinion No. 546 rates fell far below industry costs during the refund period. (4 J.A. 706-722, R. 6833-6851) Clearly, the Commission would have been justified in eliminating all refunds.

The Settlement Proposal recognized this situation, but rather than eliminate refunds entirely (as Amoco recommended below) and as recommended by FPC Staff witness Engel (4 J.A. 686, R. 6776), the Settlement reduced refund obligations from $375,000,000 to $150,000,000; and it then allowed the producers owing these remaining refunds to work them off through dedications of new reserves to interstate commerce.

Mobil, New York, and MDG oppose this whole aspect of the Settlement Proposal on the ground that the basic refund obligations imposed by Opinion No. 546 should not have been reduced at all.[8]

Opinion No. 546 refunds had to be revised downward. The only question was how far they should be reduced. The evidence of UDC witness Clay showed that they could have been eliminated completely. The

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[8] PSCNY contends that the Court below permitted the Commission to modify Opinion No. 546 only if and to the extent it found the refunds to be too burdensome. (PSCNY Brief p. 17-18) These strained attempts to construe the language of the Court below to restrict the Commission's authority to modify Opinion No. 546 ignore the language of the Court:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened."

$150,000,000 of refunds retained by the Settlement Proposal, as a result of negotiation, can hardly be adverse to either Mobil, New York or MDG in the light of Mr. Clay's evidence. Significantly, neither Mobil, PSCNY, nor MDG introduced any evidence at all comparing revenues to costs in the refund period.

As this Court observed in *Permian,* administrative authorities must be permitted, consistent with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. (390 U.S. at 784) Clearly, therefore, the Commission acted lawfully in changing its course on the basis of the reopened record.

II.

THE RATE STRUCTURE AND TREATMENT OF REFUNDS ARE JUST, REASONABLE, NON-DISCRIMINATORY AND NON-PREFERENTIAL.

A. Introduction

Only Mobil, MDG, and PSCNY out of 513 parties have contested this order. However, while each of the three petitioners attacks selected portions, none attack the entire order.

Mobil contends that the new gas rate of 26¢ is too low and that the treatment of refunds and provision for contingent escalation of the area rates are unjust, unduly discriminatory and unduly preferential. (Mobil Br. p. 34)

PSCNY contends only that the refund levels and incentive provisions are unsupported by any record evidence and are unduly discriminatory (PSCNY Br. pp. 15, 34)

MDG also contends that the refund levels and incentive provisions are unsupported by the record and discriminate in favor of some producers and against others. (MDG Br. pp. 11, 13) MDG further argues that the flowing gas rate of 26¢ per Mcf is unjustified by the record. (MDG Br. pp. 32, 34)

B. The Three Petitioners Have the Burden of Showing that the Selected Points They Choose To Attack Make the Area Rate Order Unreasonable, Unduly Preferential and Discriminatory.

When the Commission's rate order is challenged in the Courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. "And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591, 602 (1944)

The Petitioners have each attacked parts of the Commission's order but none of them has attempted to show that the order "viewed in its entirety" is unreasonable in its consequences.

The three Petitioners join in chorus to allege that the court below has affirmed a discriminatory opinion in the case. The alleged discrimination arises from the fact that some producers (including Mobil) have executed voluntary settlements, and made refunds so as to reduce their revenues to the general level of the Commission's Section 7 guidelines. (2 J.A. 599-600, R. 13585-13586) Other producers have, in the meantime, collected the higher contested Section 4 and Section 7 rates. Mobil's suggestion to cure this defect

encompassed "higher price for new gas, coupled with a procedure for retrospective achievement of equity among the Southern Louisiana producers." (2 J.A. 600, R. 13586) This remedy does not appear to be supported by either PSCNY or MDG. However, these Petitioners have been quick to seize upon this alleged discrimination as a convenient vehicle to support their appeal.

Mobil insisted that rates for new gas should be higher than the settlement rates and at levels unacceptable to the other Petitioners. While there is some evidence to support the higher level of rates advocated by Mobil, the preponderance of evidence in this record is to the contrary.

The Commission has no power to fix higher rates for the future to put Mobil in the position it would enjoy if it had not settled its cases. *State Corporation Commission of Kansas* v. *Federal Power Commission,* 206 F.2d 690 (8th Cir. 1953)

Mobil's brief is replete with abstract theories and hypotheses as to situations which could possibly transpire. There is no evidence that any of these complicated hypothetical situations are likely to occur. The Commission is an expert body best qualified to determine the likely results of its actions and should be granted some area of judgment in dealing with its intensely practical problems.

The strength of a regulatory agency—its very strongest attribute—is that it can make pragmatic adjustments and change policies which its experience has shown to be wrong. It cannot make reparation orders or restore companies who have suffered under well intentioned, but mistaken, past policies; however, it does not have to go on repeating past mistakes.

The Commission has approved a many-faceted regulatory approach, however, which contains types of incentives designed to obtain service for the consuming public. No single formula would do the job. A combination of formulae is required, but a combination of formulae will not impact with absolute equality on every producer.

Mobil contends that the Commission's order benefited only a handful of producers, but significantly, Mobil is the only producer here seeking review. The overwhelming majority of producers have found the order acceptable. Mobil's brief leaves no room for doubt that it would embrace the Commission's order if it had not accepted settlements in other cases, which it now regrets.

It would be unconstitutional for the Commission to fix confiscatory rates in order to treat all producers the way Mobil agreed to be treated.

The Commission properly observed:

> "Parties who enter into settlements or those who refuse to do so, always run the risk that the ultimate Commission's determination may be higher or lower than the settlement levels."

C. The Basic Prices Are Well Within the Zone of Reasonableness.

The flowing gas prices and related findings in paragraphs 147 through 158 of the Opinion (1 J.A. 643-648, R. 13628-13632) are supported by substantial evidence.

Staff witness Engel testified that the average cost of all past vintages of gas is 21.2¢ per Mcf. 4 J.A. 771, R. 7337) MDG witness Wiskup derived a low figure of 18.3¢ per Mcf (5 J.A. 231e Ex. No. 83, R. 10589) Pro-

ducer witness Auten derived a cost of gas-well gas flowing in 1969 in the Southern Louisiana Area of 24.03¢ at a 13% rate of return and 25.81¢ per Mcf at a 16% rate of return. (5 J.A. 202e Ex. No. 66, R. 10370) UDC witness Larson derived costs for the year 1969 falling in a range between 20.7¢ on the low side and 30.2¢ on the high side. The settlement rate of 22.375¢ per Mcf for flowing gas onshore and 21.375¢ per Mcf offshore was clearly supported by cost evidence, and fell within the range of reasonable costs.

Moreover, Staff witness Engel testified that an increase in the flowing gas price would produce an increase in the exploration effort. (4 J.A. 681, R. 6771) He recommended the settlement rate, which was only slightly higher than the staff's cost figure, for flowing gas.

The Commission held that the staff "... was candidly and correctly making the flowing gas cost bear a part of the responsibility for future exploration—in other words, it was looking to the total rate design." (2 J.A. 646, R. 13631) This finding is further supported by Paragraphs 92 through 97 of the Opinion and the evidence there cited. (2 J.A. 623, R. 13608-13611)

New gas prices are fully dealt with in Paragraphs 107 through 145 of the Opinion (2 J.A. 630-643, R. 13615-13628) and are supported by substantial evidence.

Staff witness Loring derived a cost for new gas of 24.4¢ per Mcf including gathering costs and production taxes. (5 J.A. 225e Ex. No. 80, R. 10550) On the other hand, Producer witness Sherwin derived a range of costs between 28.4¢ and 40.1¢ per Mcf. (5

J.A. 196e Ex. No. 63, R. 10323) UDC witness Ogden derived a cost of 27.6¢ per Mcf (5 J.A. 178e Ex. No. 57, R. 10234) saying that this was one point in a range, because, as UDC witness Larson explained, there are literally hundreds of methods or permutations of methods of allocating costs. (4 J.A. 534, R. 5934, 4 J.A. 635, R. 6637) Any finding of exact costs, although supportable, must contain a degree of sophistry.

Staff witness Engel supported a 26¢ new gas price. He submitted rate design evidence including a rate of 25¢ per Mcf based on 1969 costs. (4 J.A. 685-686, R. 6776-7) He testified, however, that costs were increasing at an approximate rate of 5% per year. (4 J.A. 691, R. 6786) He stated that in view of increasing demand for gas and the demonstrated need for finding appropriate levels of reserves, it is necessary to provide an additional allowance for growth. He said that each Mcf of gas produced and sold should provide not only for the recoupment of incurred cost at historical levels but also for the discovery of more than one Mcf in the future—at higher costs. (4 J.A. 688, R. 6782-3) He recognized a certain amount of imperfection in any cost determination (4 J.A. 799, R. 7458-9) and stated that the settlement price of 26¢ was reasonable. (4 J.A. 790, R. 7442)

D. The Commission Properly Adopted the Escalations in the Basic Prices.

The Commission properly found that the prices for both new and flowing gas fell within the range of reasonableness shown by the evidence in the proceeding; and it approved these prices "subject" to the automatic and contingent escalations provided by the agreement. (R. 13628 and Par. 157)

1. Automatic Escalations.

As to both flowing gas and new gas there is a one-half cent fixed escalation, that for flowing gas on October 1, 1973, and that for new gas on October 1, 1974. Such fixed escalations are customary in all long-term arrangements for gas and they are well supported by the evidence in this proceeding.

Evidence of continuing upward cost pressure following the test year was introduced by Staff witness Engel. (4 J.A. 691, R. 6786) It is unrealistic to argue that after gas has been discovered and dedicated, the cost of production does not increase. Labor, overhead, materials and supplies, and taxes continue to rise.

2. Contingent Escalations.

In addition to the fixed escalations, the Settlement includes three one-half cent contingent escalations in flowing gas price, upon the dedication in three stages of a total of 15 trillion cubic feet of new gas reserves to the interstate market. These escalations are vehemently attacked by PSCNY and MDG as being wholly unsupported and really a "bonus" to the producers. In *Permian* the Supreme Court approved the use of incentive pricing and these contingent escalations provide a real incentive. Only experience can measure their success, but the Commission in its expert judgment has found them to be reasonable.

The Commission would have been amply justified by (a) evidence of current costs in a broad range, (b) evidence of prospective cost increases affecting flowing gas, and (c) evidence of a gas shortage of growing dimensions in granting higher gas prices as an incentive. Instead it chose to tie such higher prices to new reserve

dedications. This is an experiment in incentive pricing which is well within the Commission's discretion. If no new reserves are dedicated, no increased prices will be paid. If the contingent escalations are ultimately triggered by increased dedications, this experiment will have proved successful.

The Commission's findings in paragraphs 157 and 158 (R. 13632) are fully justified.

Mobil contends that these escalations are unreasonable and discriminatory, because dedications by them and by new entrants would go to the benefit of other producers of flowing gas, and in particular other producers who have refund obligations. In this it is joined by PSCNY and MDG and all cite the supposed deleterious effect on pipelines as new entrants.

In reply we would point out that the pipelines, whose position is "volunteered" by the objectors, all support the Settlement. We would also point out that the position of the objectors would lead to a host of differing and individual flowing gas ceiling prices, wholly at war with the concept of uniform area pricing.

The flowing gas prices in the Settlement and in the Commission's area rate orders are all predicated on industry-wide, not individual, cost computations; and these should likewise escalate on industry-wide considerations.

To say, as does Mobil, that its flowing gas price should escalate by reason of its own dedications and that its dedications should not benefit the price to be paid to a large refund obligor, must assume that the basic area price is tuned to the individual costs of

Mobil on the one hand and to those of large refund obligors on the other. But it is not! It is based on industry average costs; and in point of fact the basic area price may be too high in relation to Mobil and too low in relation to other producers. We do not know individual costs or individual situations, and, therefore, in accord with the basic averaging technique which lies at the heart of Area Rate principles, the Settlement escalates area prices on an industry-wide or averaging basis.

The New York Commission introduced absolutely no evidence in this record. It has no basis for its claim that the flowing gas prices fully cover all costs and that anything else is a "give away." Considering the extensive cost evidence introduced by others—such as witness Larson of UDC—showing cost ranges with points above the negotiated flowing gas price, the charge of give away or bonus falls. Rates, including contingent escalations, are within the range of reasonable costs and the escalations provide an incentive for further drilling.

E. The Treatment of Refunds Was Fully Justified.

Under point I above we discussed evidence which would have justified the complete forgiveness of refunds. The parties who may be required to make refunds voluntarily agreed, as a part of the settlement to either (a) refund $150,000,000 or (b) work off refunds by dedicating one Mcf of gas to the interestate market for each penny of agreed refund. This creates a much needed incentive to obtain more gas for the inadequately served interstate market.

The PSCNY attack upon this and other incentives contained in Opinion No. 598 is not well founded. It

makes the argument at page 44 of its brief that there is no showing that the interstate market can ever compete with the intrastate market for available onshore supplies in Southern Louisiana. Inconsistent arguments are advanced that the incentives provided by the Commission are unnecessary.

It is argued that the dedications necessary to earn the contingent escalations are too small because they are much less than volumes dedicated in the mid-1960's. (MDG Brief p. 51, PSCNY Brief p. 36) But this argument ignores the evidence of UDC witnesses that in more recent years no substantial new supplies of natural gas have been available for purchase. (Batten, 3 J.A. 14, R. 892; Borger, 3 J.A. 22, R. 903-4; Ford, 3 J.A. 38, R. 922; Thomas, 3 J.A. 58-59, R. 948-949)

Dedications at past levels would be welcome, but the fact is the gas is not available. As Mr. Winger pointed out in his testimony, there has been a great decline in funds devoted to the search for natural gas and unless there is a great increase, the shortage will become more and more severe.

Petitioners in their briefs describe the incentives provided by the Commission's order as if they were astronomical in size, but when compared to the funds required to do the job, as described by Mr. Winger, *supra* under I, they are shown to be small indeed.

III.

THE MINIMUM CHARGES ESTABLISHED FOR THE TRANSPORTATION OF COMMINGLED LIQUIDS AND LIQUEFIABLE HYDROCARBONS ARE AMPLY SUPPORTED BY SUBSTANTIAL EVIDENCE AND NECESSARY TO PRESERVE THE COMMISSION'S JURISDICTION OVER NATURAL GAS.

The minimum charges established for the transportation of commingled liquids and liquefiable hydrocarbons (2 J.A. 650, 660, R. 13634, 13645) were found by the court below to have been determined by the FPC on a "substantial evidentiary basis." (483 F.2d at 911) This finding is adequately supported by the testimony. (W. P. Anderson, 4 J.A. 606-608, R. 6395-6398; John L. Moye, 4 J.A. 610-616, R. 6401-6408).

Mobil advances the argument that the decision by the U.S. Court of Appeals for the District of Columbia in *Mobil Oil Corporation* v. *Federal Power Commission,* 483 F.2d 1238 (D.C. Cir. 1973) conflicts with the Court's decision in this case. Such allegation of conflict is without merit. The D.C. Court of Appeals vacated FPC Order No. 449, which set rates for the transportation of commingled liquids and liquefiables, for essentially two reasons. The first was that the Commission's procedures were "inadequate" in that they failed to conform to the requisites of the Administrative Procedures Act. (5 U.S.C. §§ 551 *et seq.*) The second scored the Commission for not demonstrating the necessity of setting minimum rates for liquids in order to preserve its jurisdiction over natural gas. (483 F.2d at 1249) In so holding, the D.C. Court of Appeals was, in effect, attacking the adequacy of the record and of the Commission's findings. (483 F.2d at 1263-4)

The instant case, however, stands in an entirely different posture. The record is replete with substantial evidence adequately supporting all of the Commission's findings. In exercising jurisdiction over the minmum rates for liquids transportation, the Commission has implicitly determined that such exercise is necessary to preserve its rate jurisdiction over natural gas. This determination is well supported by the testimony and evidence presented by W. P. Anderson and John L. Moye as referenced above.

The whole regulatory scheme would be rendered a nullity if the exigencies of the market place could force pipeline companies to transport liquids for less than the minimum amount required to assure the gas consumer that he is not charged costs attributable to such liquids. If the Commission fixes wellhead prices and the producer can exact more by requiring the pipeline purchaser to haul his liquids at less than cost, the producer will circumvent the Commission's rates. Mobil argues in substance that the FPC is powerless to prevent it from charging a just and reasonable rate, plus some free transportation service for its liquid hydrocarbons.

IV.

THE COMMISSION MAY ESTABLISH MORATORIA ON AREA RATE CHANGES AND LIMIT THE ALLOWANCE FOR ROYALTY PAYMENTS UNDER SECTION 4 OF THE NATURAL GAS ACT WHERE THE INDIVIDUAL PRODUCER HAS SEVERAL METHODS AVAILABLE FOR SEEKING DEVIATION.

The moratoria on rate increases in this case are "clearly a lawful exercise of administrative judgment" (483 F.2d at 908). This finding by the Court below stands in sharp contrast to the Petitioner's argument

that it violates Section 4 of the Natural Gas Act as construed in *Permian*.

In *Permian*, the Commission applied a moratorium and this Court affirmed, finding that it presented no obstacle to those procedures seeking special exceptions from the area ceilings. As the Court stated in *Permian* and as applicable to this case:

> "This is not a case in which the Commission has sought to bind producers, without recourse and in the face of changing circumstances, to an unchanging rate structure." (390 U.S. at 788)

Although *Permian* did not involve circumstances of changing costs, the Commission, in this case, has made adequate and reasonable provisions for such changes. The multi-faceted approach to the area rate problem, here at issue, fully recognizes that individual circumstances may often warrant specialized relief.

In Order No. 455, issued in Docket No. R-441 on August 3, 1972, the Commission promulgated 18 C.F.R. § 2.75, "Optional Procedure for Certificating New Producer Sales of Natural Gas." This new procedure provides a method for the sale of post-April 6, 1972 gas at rates in excess of the applicable area rate ceiling and not subject to refund, if determined to be in the public interest.

Moreover, producers may seek relief by direct petition to the FPC for authorization to deviate from the area ceilings. An example of this is *George Mitchell and Associates*, Op. 649, Opinion and Order Granting Special Relief and Terminating Proceedings, —— F.P.C. ——, (February 21, 1973). Other alternatives include the filing of certification of emergency pur-

chases under the provisions set forth in Order 431, 45 F.P.C. 570 (April 15, 1971), and applying for an initial certification of a sale in excess of area rates, but subject to the later determination of area rates under the terms of the Statement of Policy, paragraph 12, in Docket No. R-389A, 35 Fed. Reg. 11638 (July 17, 1970).

The Petitioner's argument that the Commission's decision precludes the "examination of area rates in the light of future changing economic conditions" (Mobil Pet. 28-29), not only disregards the aforementioned provisions for special relief, but also ignores the automatic escalation on flowing gas (.5¢ per Mcf for flowing gas and 1¢ per Mcf on new gas) and the contingent escalations (1.5¢ per Mcf upon achieving target levels of gas dedications).

The Commission's very practical problems require workable solutions. Mobil is the only Petitioner objecting to the moratorium and, like George Mitchell, above, it is free to ask for special relief if it is justified.

Mobil also argues that the Commission's provision for royalty payments in its determination of costs in fixing area rates is "inadequate." The problems of future increased royalty payments, similar in substance to that of any increased cost during the moratorium period, are amenable to the same provisions for relief as discussed above. Certainly the Commission should give no incentive to the producers to capitulate to demands for increased royalty payments.

V.

THE COURT OF APPEALS PROPERLY HELD THAT THE FEDERAL POWER COMMISSION HAS DISCRETION WITH RESPECT TO REFUNDS.

The court below held that the FPC "may" require refunds under Section 4(e) of the Natural Gas Act but is not required to do so. The law is well settled that words are given their ordinary meaning unless compelling reasons require a different construction.

The substance of MDG's argument is that "may" as used in Section 4(e) of the Natural Gas Act means "shall."

In *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank,* 262 U.S. 649, 662-3 (1923), Justice Brandeis speaking for the court said:

> "It is true that in statutes the word 'may' is sometimes construed as 'shall.' But that is where the context, or the subject matter compels such construction."

In *Rock Island* this Court said the intent of the legislature was the test in that type of case and:

> "The line which separates this class of case from those which involve the exercise of a discretion, judicial in nature, which courts cannot control, is too obvious to require remark."

In that case Justice Brandeis distinguished *Supervisors of Rock Island Co.* v. *United States,* 71 U.S. 435 (1867), cited by MDG, which held that a statute which said the Board of Supervisors "may" levy a special tax to pay local debts, required the Board of Supervisors to act when the local government was insolvent. This Court held that was the clear overall intent of that statute.

The other case cited by MDG, *Mason* v. *Fearson,* 50 U.S. (9 Howard) 248 (1850), held that where there was a tax delinquency on each of several lots belonging to one owner, a District of Columbia statute authorizing the sale of land to pay taxes but providing that the tax collector "may" stop selling lots when he has sufficient revenue to pay delinquent taxes on all lots, clearly meant that the sales "shall" stop. The tax collector exceeded his authority when he continued to sell lots at less than market value when he had received enoungh money to pay all delinquent taxes. The court further held this was the clear intent under the statute when construed as a whole.

Neither of the cases cited by MDG involved a statute under which a regulatory commission was given discretion.

The legislative intent to confer discretion under Section 4(e) of the Natural Gas Act is clear from the following language of House Report 709 to accompany H.R. 6586 [9] 75th Cong. 2d Sess.:

> "Subsection (e) [4(e) of the NGA] authorizes the Commission to hold hearings concerning the lawfulness of any proposed change in rates, . . . the Commission may require the natural gas company to make refunds if the increase is not approved; . . ."

Senate Report No. 1162 to accompany H.R. 6586 contained identical language.

In *Wisconsin* v. *F.P.C.,* 303 F.2d 380, at 386 (D.C. Cir. 1961), Judge Prettyman stated that Section 4(e) pertinently says that the Commission "may" order a

[9] H.R. 6586 became the Natural Gas Act.

refund and that this is not mandatory. While the Supreme Court in reviewing that case did not specifically deal with the Commission's discretion to order a refund under Section 4(e), Mr. Justice Clark in a separate opinion speaking for four justices stated that under certain conditions the Commission might have to forgive refunds. *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 324 (1963) footnote 8.

In *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), this Court reversed that part of the decision of the Court of Appeals for the Tenth Circuit which imposed limitations upon the Commission's authority to require refunds. This Court stated the Court of Appeals should not have imposed any additional limitations on the Commission's "discretion" with respect to refunds.

That "may" as used in Section 4(e) of the Natural Gas Act is intended to confer discretion, is also supported by the fact that "may" is used in juxtaposition to "shall" throughout the Natural Gas Act. In Section 4(e) where the "may" in question appears, "shall" is used five times and "may" is used three times.[10]

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[10] (e) Whenever any such new schedule is filed the Commission *shall* have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, *may* suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

Under some circumstances certain things must be done, but the requirement of refunds is discretionary. *United States* v. *Thoman,* 156 U.S. 353 (1895), *Anderson* v. *Yungkau,* 329 U.S. 482, 485 (1947), *Horack, Sutherland Statutory Construction,* 3rd ed. Sec. 5821, *Federal Land Bank* v. *Hansen,* 113 F.2d 82, 84 (2nd Cir. 1940).

Clearly, therefore, the Court below was correct in holding that the Commission is not required to order refunds because "may' confers discretion upon the Commission.

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effect: *Provided,* That the Commission *shall* not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission *may* make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service *shall* go into effect. Where increased rates or charges are thus made effective, the Commission *may,* by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decison found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable *shall* be upon the natural-gas company, and the Commission *shall* give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

VI.

WHILE THERE ARE SIMILARITIES IN THE ISSUES HERE AND IN THE TEXAS GULF COAST AREA RATE CASE, WHICH WAS REMANDED BY THE DISTRICT OF COLUMBIA CIRCUIT, THE TWO RECORDS ARE SUBSTANTIALLY DIFFERENT.

The decision of the United States Court of Appeals for the District of Columbia in *Texas Gulf Coast Area Natural Gas Rate Case, P.S.C.* v. *Federal Power Commission,* 487 F.2d 1043 (D.C. Cir. 1973), cited by Petitioners, reversed an order of the Federal Power Commission which reached a similar result to the result reached below, but on a substantially different record.

The remand of the *Texas Gulf Coast Area Rate Case* was premised on the absence of Commission analysis (483 F.2d at 1070) and the absence of substantial basis in the record. (487 F.2d at 1070)

The Commission's decision in this case was made on the basis of an extensive and voluminous record as discussed in this brief and as evidenced by the Joint Appendix. Moreover, such Opinion presents extensive and reasoned discussion and analysis of the evidence and testimony submitted and made a part of this record.

The Commission's effort in the *Texas Gulf Area Rate Case,* while laudable in its intent to resolve an immediate and pressing problem, was found to be technically deficient by the District of Columbia Court of Appeals. The fact is that the *Texas Gulf Coast Case* reversed by the D.C. Circuit was decided in 1971, and the record was closed in 1968. The Commission applied the principles of the Southern Louisiana Settlement in the *Texas Gulf Coast* case without adequate record support,

or adequate findings, or adequate explanations. That detracts nothing from this case. That deficiency does not exist in this case.

In *Permian Basin Area Rate Cases,* 390 U.S. 747 at 767 (1967), this Court quoted Section 19(b) of the Natural Gas Act as providing that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." "More important," continued the Court, "we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts."

CONCLUSION

The Commission has acted within the area of its expertise on the basis of substantial evidence and findings of fact to fix just and reasonable rates and the court below properly found no error.

Those who would upset the rate orders have not "met the burden of showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591, 602 (1944).

WHEREFORE, the Order below should be affirmed.

Respectfully submitted,

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